

84-721 (1)

Office-Supreme Court, U.S.

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ALEXANDER L. STEVAS,
CLERK

No.

In the

Supreme Court of the United States

October Term, 1984

GAIL PAPPALARDI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS**

GAIL PAPPALARDI
Petitioner pro se
c/o COMER & MEYERSON
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New York, New York 10017
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QUESTION PRESENTED

1. Was it a violation of the petitioner's constitutional rights under the 6th Amendment of the U.S. Constitution as made applicable to the states by the 14th Amendment, when the trial court refused to grant a mistrial or to give a cautionary instruction to the jury to cure the closing remarks of the prosecutor that the petitioner's request for an attorney was evidence of a consciousness of guilt.

Introduction

The purpose of this study is to investigate the effects of the proposed changes on the system. The study is divided into two main parts: a theoretical analysis and an empirical investigation. The theoretical analysis is based on the principles of the system and the proposed changes. The empirical investigation is based on the results of the experiments conducted. The results of the experiments are presented in the following sections. The first section presents the results of the experiments conducted on the system. The second section presents the results of the experiments conducted on the proposed changes. The third section presents the results of the experiments conducted on the system with the proposed changes. The fourth section presents the results of the experiments conducted on the system with the proposed changes and the results of the experiments conducted on the system with the proposed changes and the results of the experiments conducted on the system with the proposed changes.

TABLE OF CONTENTS

	Page
Question Presented.....	i
Table of Authorities.....	iii
Opinion Below.....	2
Jurisdiction.....	2
Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved.....	3
Statement of the Case.....	5
Reasons for Granting the Writ.....	19
THE NEW YORK COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.	
Conclusion.....	28
Appendix	
Order of the Court of Appeals of the State of New York.....	1A
Order of the Appellate Division, First Department.....	2A

TABLE OF AUTHORITIES

<u>People v. Conyers</u>	
49 N.Y. 2d 182	
(N.Y. Court of Appeals, 1980).....	23
 <u>People v. Simon</u>	
75 A.D. 2d 156	
App. Div., (First Dept., 1980).....	23
 <u>People v. Sharp</u>	
119 Misc. 2d 200	
(Crim. Ct., NY County, 1983).....	23

STATUTES AND OTHER AUTHORITIES

N.Y. Penal Law Section 125, 25, subdivision 1.....	5
 Rule 17.1(c) Rules of the United States Supreme Court.....	2
 28 U.S.C. Section 1257 (3).....	2
 U.S. Constitution, Amendment V.....	22
 U.S. Constitution, Amendment VI.....	3, 19 20, 22
 U.S. Constitution, Amendment XIV....	4, 19

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

1954-1955

PHYSICS 101

LECTURE NOTES

BY

ROBERT R. WATSON

1954-1955

PHYSICS 101

LECTURE NOTES

BY

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**PETITION FOR A WRIT OF CERTIORARI
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The petitioner, GAIL PAPPALARDI, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals entered in this proceeding on September 10, 1984.

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OPINION BELOW

The opinion of the New York Court of Appeals, not reported, and the opinion of the Appellate Division of the State of New York, First Department, appear in the Appendix hereto.

JURISDICTION

The judgment of the New York Court of Appeals, the highest tribunal in the State of New York was entered on September 10, 1984. No motion for rehearing was filed. This petition for certiorari was filed within sixty (60) days of judgment. This court's jurisdiction is invoked under 28 U.S.C. Section 1257(3) and Rule 17.1 (c) of

The subject of the present paper is the question of the possibility of the existence of a system of linear transformations which is invariant under the action of a group of linear transformations. This question has been considered by many authors, and the results are well known. In the present paper, we shall consider the question of the existence of a system of linear transformations which is invariant under the action of a group of linear transformations, and we shall show that such a system does exist.

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the Rules of the United States
Supreme Court.

CONSTITUTIONAL PROVISIONS, TREATIES,
STATUTES, ORDINANCES AND REGULATIONS
INVOLVED

AMENDMENT VI - JURY TRIAL FOR CRIMES,
AND PROCEDURAL RIGHTS

In all criminal prosecutions,
the accused shall enjoy the right
to a speedy and public trial, by an
impartial jury of the State and
district wherein the crime shall
have been committed, which district
shall have been previously
ascertained by law, and to be
informed of the nature and cause of
the accusation; to be confronted
with the witnesses against him; to
have compulsory process for

obtaining witnesses in his favor,
and to have the Assistance of
Counsel for the defense.

AMENDMENT XIV. CITIZENSHIP: PRIVILEGES
AND IMMUNITIES: DUE PROCESS; EQUAL
PROTECTION: APPORTIONMENT OF
REPRESENTATION; DISQUALIFICATION OF
OFFICERS: PUBLIC DEBT: ENFORCEMENT

Section 1.

All persons born or naturalized
in the United States, and subject
to jurisdiction thereof, are
citizens of the United States and
of the State wherein they reside.
No state shall make or enforce any
law which shall abridge the
privileges or immunities of
citizens of the United States; nor
shall any State deprive any person
of life, liberty, or property,
without due process of law; nor

which may otherwise be the case
and on that the Commission is
convinced for the future

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Article 1

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shall any State deprive any person
of life, liberty, or property,
without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered in the Supreme Court, New York County on September 22, 1983, and from the sentence imposed thereon.

On April 25, 1983, an indictment was filed in the County of New York against Gail Pappalardi. It charged the defendant with one count of murder in the second degree under Penal Law Section 125.25, subdivision 1, allegedly committed as follows: "The defendant in the County of New York on or about April 17, 1983, with intent to cause the death of Felix Pappalardi, caused the death of Felix Pappalardi,

May 10, 1931, at the age of 35.

He was a native of the United States.

He was born

at the age of 35.

He was a native of the United States.

He was a native of the United States.

He was a native of the United States.

He was a native of the United States.

He was

On April 12, 1931, at the age of 35.

He was a native of the United States.

He was a native of the United States.

He was a native of the United States.

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by shooting him with a pistol."

The hearing on defendant's motion to suppress tangible evidence and statements, and the trial of the indictment which followed immediately thereafter, were held before Justice James Leff, in Part 67, New York County, Supreme Court, commencing on August 31, 1983.

The Court submitted to the jury that one count of Murder contained in the indictment; in addition, and over the objection of the defendant, the Court submitted as lesser included offenses, Manslaughter in the first degree, Manslaughter in the second degree and Criminally Negligent Homicide.

The jury returned verdicts of not guilty on the Murder and Manslaughter

counts, and guilty on Criminally Negligent Homicide.

On October 12, 1983, the Court imposed on the defendant the maximum sentence allowed by law, imprisonment for a term of one and one-third to four years.

On June 28, 1984, the Appellate Division, First Department unanimously affirmed the conviction without opinion. On September 10, 1984, the New York Court of Appeals denied permission to appeal.

The one count Indictment alleged that the defendant with the intent to cause the death of Felix Pappalardi, caused the death of Felix Pappalardi, by shooting him with a pistol.

During all phases of the trial, the People maintained only one theory:

that the defendant intentionally shot and killed her husband. At no time, did the People argue that the defendant was guilty of any of the so-called lesser included offenses.

On opening, the People stated that they intended to prove that the defendant intentionally killed her husband in anger. Assistant D.A. Barden argued that documentary and testimonial evidence would be introduced to demonstrate that defendant and her husband had a marital relationship that deteriorated throughout the years; that Felix Pappalardi came home between 5:00 to 5:30 a.m. on the 17th day of April, 1983 (a Sunday), exchanged words with Mr. Wesly Clerge, the doorman of the apartment building where Felix and Gail

Pappalardi resided; that a neighbor heard noises of loud talking and music; that the defendant called the police and admitted that she had shot her husband; that the Chief Medical Examiner, Dr. Elliot Gross performed an autopsy showing that Mr. Pappalardi had died as a result of a bullet wound.

During the People's case, two telephone calls were admitted into evidence, over objection. One was a call from the defendant to "911" Emergency. The second call was from the 911 Police Unit calling the defendant subsequent to the first call. The calls stated as follows:

"April 17, 1983

Call # 1

Opr: 177...where's the emergency?
F/V: Number 30 Waterside Plaza.
OPR: number thir..
F/V: Off 34th...ah...23rd Street.
Opr: Number 30 Waterside Plaza.

F/V: Yes.
Opr: What, what's wrong there?
F/V: The entrance is off tw...twenty-second..
Opr: What apartment are you in, Miss?
F/V: Five, er, yes, and D for David.
opr: 5D for David.
F/V: Yes
Opr: On the 5th floor?
F/V: Please hurry.
Opr: Ma'am...5th floor?
F/V: Five D for David...
Opr: ...David...on what floor?
F/V: Five.
Opr: And what is your telephone number?
F/V: 683-3576. A man is dying.
Opr: Ma'am stay on the line...do not hang up...I am connecting you to the emerg...
F/V: I must call my lawyer.
Opr: Listen to me...what is the problem there?
F/V: I believe I've shot him...I didn't mean to but I did.
Opr: You shot a man?
F/V: I think so...you're wasting...
Opr: O.K.
F/V: ...time...
Opr: O.K., listen...
F/V: Please.
Opr: O.K., Ma'am uh...someone will be there as soon as possible, Ma'am.
F/V: Thank you, thank you.
Opr: O.K. Ma'am."

"April 17, 1983

Call #2.

Opr: Units -- (phone stops ringing)
Hello.
F/V: Yes.
Opr: O.K. Stand by...I'm trying to
get you a...
F/V: Yes.
Opr: Hello.
F/V: Yes.
Opr: Yeah, listen, this is the Police
Department.
F/V: Yes.
Opr: You called?
F/V: Of course.
Opr: What's the matter?
F/V: I believe I sh...I killed my
husband.
Opr: You didn't mean to?
F/V: But...
Opr: Is he moving any at all?
F/V: Not at all, and it , it was
right in the throat, I think it
was the carotid, I don't know
how to do first aid.
Opr: Well listen...
F/V: Help me.
Opr: Miss, Miss, Miss, calm down,
they're on their way there. You
know, anything else you want to
tell me?
F/V: Like what?
Opr: What, h..., you know, how did
you do it?
F/V: Anger...but, ah, not
intentional, never, never,
never.
Opr: O.K. listen, they're on their
way up, all right?
F/V: Thank you.

Opr: Sit tight, at the house.
F/V: Thank you.
Opr: Where is...
F/V: I need to get dressed and be ready.
Opr: Where is it? Oh, you don't have any clothes on?
F/V: Number 30, Waterside Plaza, please hurry.
Opr: Yeah, put something on because they'll be there in a few minutes.
F/V: Yes, all right.
Opr: All right?
F/V: Thank you.
Opr: O.K.
F/V: Goodbye."

On summation, the People clung to the single theory that the defendant intentionally murdered her husband. No mention of negligence or any other theory was ever mentioned.

Mrs. Pappalardi testified and swore that her husband's death was an accident. Mrs. Pappalardi testified that through their approximately 20 years relationship, her husband and she had an "open" relationship and marriage

whereby they each had love relationships with others.

Indeed, the woman her husband was currently seeing, Valerie, was a very neurotic and unstable woman who was frequently threatening to commit suicide.

Mrs. Pappalardi admitted problems with her marriage but these problems were mostly the result of her husband's use of heroin and "shooting" cocaine.

With respect to her knowledge of weapons, Mrs. Pappalardi testified that she had shot with rifles and had gone target shooting and skeet shooting.

Her husband attempted to teach her to handle handguns in the past in Nantucket. Felix was an expert with guns and she knew that. He had been in

the Army, had medals as an expert in guns, and was a very good shot.

Nevertheless, Mrs. Pappalardi never felt comfortable with handguns.

As to the night of the tragic incident, Mrs. Pappalardi testified that on April 16, 1984, she and Felix awoke at approximately 3 to 4 in the afternoon. Between 11 PM and 12 AM of that evening, Felix left to go to the Ritz Nightclub. He asked Mrs. Pappalardi to come with him, but she refused.

Instead she worked at her computer, which required a lot of concentration.

When Felix returned, he wanted her to turn off the computer, which she did not do immediately. Felix went in to the bedroom and they talked from room to room.

the day, and that it is not yet
known what will happen.

Washington, D.C. - Tuesday

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When Mrs. Pappalardi did come into the bedroom to get ready for bed, Felix was lying in bed.

They were talking about many subjects. Felix was talking in a normal tone of voice; he was communicating in a coherent fashion, and his speech was not slurred.

As Mrs. Pappalardi was looking through the chest of drawers, she saw the derringer in the 3rd or 4th drawer. The gun was supposed to be kept in the safe with Felix's other guns.

Mrs. Pappalardi became angry and asked why was she forced to look at the gun.

Instead of putting the gun away, Felix's reaction was to tell Mrs. Pappalardi to shut up and that she was

being a baby.

Felix was so "insistent", "vocal" and "intimidating", that Mrs. Pappalardi handled the gun and became familiar with it.

His position was that he was going to Paris and that she would be helpless. He wanted her to stop being stupid about guns and to learn to handle the derringer.

He told her that the gun was not loaded and that she was safe. He directed her to handle the gun and to open and close it.

He explained to her that in order to use the gun, she would have to cock it and in order to release it, she had to put the thumb on the hammer, touch the trigger and ease the hammer back. She did this two or three times.

After doing this, he said "See, you can do it". Mr. Pappalardi then said that to be real, she should put a bullet in. She refused to do so. He got upset and told her that she had to know how to defend herself since he will be leaving for Paris. She felt ashamed of being afraid and felt he was very intimidating.

So finally, she followed his instructions and put a bullet in. She was careful and held the gun away from him and her. She was sitting in a couch by the chest of drawers while he was watching her, lying down at the bed more or less facing her.

She cocked and uncocked the gun at least once.

He wanted her to repeat the procedure so that she felt comfortable

while doing it.

Then "something happened" which made her lose her balance and cause the accident. She doesn't remember whether she was still in a couch or standing when the gun went off. Mrs. Pappalardi testified that once the gun went off, she did not remember what occurred.

voice from the
the "singing machine" which
made the loud, rhythmic and joyful
accident. The music's cheerful melody
and was still in a state of confusion
when the gun went off. The incident
testified that once the gun was off,
the old melody was forgotten.

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals has decided an important point of federal law which has not been, but should be, settled by this Court.

The Court of Appeals allowed the affirmance of the conviction of the petitioner to stand affirmed, in derogation of her rights pursuant to the U.S. Constitution.

The issue of paramount importance in the instant case is whether there was a violation of the petitioner's constitutional rights under the Sixth Amendment of the U.S. Constitution as made applicable to the states by the 14th Amendment, when the trial court refused to grant a mistrial or to give a cautionary instruction to

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals has decided an important point of Federal law which has not been out of the way, settled by this Court.

The Court of Appeals allows the petitioner to stand allowed, in recognition of her long service to the State of New York.

The issue of whether there was a violation of the petitioner's constitutional rights under the Sixth Amendment of the U.S. Constitution as made applicable to the States by the 14th Amendment, when the trial court refused to grant a mistrial or to give a cautionary instruction to

the jury to cure the closing remarks of the prosecutor that the petitioner's request for an attorney upon first speaking to the police authorities on the 911 recordings was indicia of consciousness of guilt. It is the petitioner's contention that these remarks were in contravention of the petitioner's absolute right to counsel pursuant to the Sixth Amendment of the U.S. Constitution.

During the summation, the prosecutor told the jury that the defendant's statement on the first 911 tape that she wanted to call her attorney indicated a consciousness of guilt, as follows:

"According to her testimony, the first thing that she thinks of, in the course of speaking to 911, after telling them what the problem is, is I have to call my lawyer. Why? She knew she was in trouble.

the jury to read the closing words of the indictment that the defendant's argument for an attorney upon this speaking to the police authorities as the all recordings was taken at the conclusion of July 11 in the defendant's contention that these records were in contravention of the defendant's absolute right to counsel pursuant to the sixth amendment of the U.S. Constitution.

During the hearing, the prosecutor told the jury that the defendant's statement on the first 911 tape that she wanted to call her attorney indicated a consciousness of guilt as follows:

"According to her testimony, the first thing that she thinks of is the course of speaking to 911, after calling them what the problem is. Is I have to call my lawyer. Why she knew she was in trouble."

She knew what she had done, and she knew that she needed to get in touch with somebody who could give her legal advice."

This remark, was, obviously, greatly prejudicial.

The trial court admitted that the retention of a lawyer has no bearing on guilt or innocence. Yet, not only did the trial court refuse to grant a mistrial, it also refused to cure the prejudice by giving a cautionary instruction.

The comments of the prosecutor during summation that the petitioner's statement to the police authorities during her 911 call that she wanted to call her lawyer signified that "She knew, she was in trouble" and that "she knew what she had done" was an unjustifiable infringement upon the

The show what she had done, and she
 knew that she needed to get it
 done with someone who could give
 her legal advice."

This woman, was, obviously,

financially embarrassed.

The trial court admitted that the
 retention of a lawyer was an implied
 duty of the defendant, but that the
 trial court refused to grant a
 judgment. It was argued to the court
 that the defendant, by giving a statement
 to the police, was in a position to
 retain a lawyer.

The court of the defendant
 during the trial that the defendant's
 statement to the police was
 during her trial that she wanted to
 call her lawyer advised that "she
 knew, she was in trouble" and that she
 knew what she had done" was an
 admission upon the

appellant's Sixth Amendment right to an attorney.

The prosecutor's comments prejudiced the petitioner as surely as a comment on the silence of a defendant or a suspect in a criminal case would be prejudicial and violative of a defendant or suspect's right not to incriminate himself or herself pursuant to the Fifth Amendment of the U.S. Constitution.

Although the State of New York argued below that this comment was not wrongful or prejudicial because it was a mere comment on the timing of appellant's request for an attorney rather than a comment about her right to an attorney, this argument fails in the same manner that a comment regarding the timing of a suspect's silence would nevertheless be violative

appears a third defendant who is a
witness.

The Government's position is
justified the position is that it
is correct on the issue of a witness
to a suspect in a criminal case would
be prejudicial and violative of a
defendant or suspect's right not to
incriminate himself or herself or others
in the case. The Government of the U.S.
is not.

Although the State of New York
argued before this court that the
witness is prejudicial because it is
a well known fact that the right of
a witness to remain silent is an
important part of the right of
a suspect to remain silent. This argument fails to
take into account the fact that a
witness is not a suspect and is not
subject to the same rights as a suspect.
The Government's position is that a
witness is not a suspect and is not
subject to the same rights as a suspect.

of said suspect's rights.

In other words, just a comment regarding a suspect's silence is an infringement on his or her rights whether such silence was the defendant's action (or non-action) as a suspect when first confronted with questions of the police or his or her action in not testifying at a trial. A prosecutor's comment regarding a suspect's request for an attorney as an indication of his or her consciousness of guilt is similarly wrongful no matter when the suspect requested an attorney. See People v. Conyers, 49 N.Y. 2d 182 (N.Y. Ct. of Appeals, 1980); People v. Simon, 75 A.D. 2d 516 (App. Div., First Dept., 1980); People v. Sharp, 119 Misc. 2d 200 (Crim. Ct., N.Y. County, 1983).

No matter how the State now

desires to characterize the prosecutor's comments, the plain meaning of the comments was a direct accusation that Mrs. Pappalardi's statement that she wanted to get in touch with an attorney showed "she knew what she had done."* In other words, this was a direct statement that her request for an attorney evidenced that she knew she was guilty of murdering her husband. This is a most heinous type of comment on the proper exercise of petitioner's right and has a

*There can be no question that when the prosecutor referred to what "she had done" she was referring to the People's accusation that the defendant had murdered her husband inasmuch as said comment immediately followed Ms. Barden's sarcastic reference to an "accidental" shooting. Specifically, Ms. Barden referred to the first 911 call, as follows: "She then goes on to say in the next statement she makes to the 911 operator, I have to call my lawyer, in an accidental shooting."

... to characterize the
 Prosecutor's comments on the
 meaning of the statement was a direct
 suggestion that Mrs. Barden's
 statement that she wanted to get a
 divorce with an attorney named "the man
 who had gone" in some way
 was a direct suggestion that
 she was an attorney or that
 the man she was going to was
 her husband. This is a clear
 type of comment on the part of
 the Prosecutor's staff and his

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 who' was referred to the Barden's
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 'accidental' shooting. Specifically,
 Mr. Barden referred to the fact that
 he then goes on to
 say in the next statement she makes to
 the 911 operator, I have to call my
 lawyer, in an accidental shooting."

chilling effect on any future suspect's exercise of their constitutional rights.

Moreover, the prosecutor's comments were not a direct or a proper response to the defense summation. Although the defense did point out that Mrs. Pappalardi evinced concern for her husband by calling 911, a proper response would have been to dispute said facts or to show facts evidencing a lack of concern for Felix. A concern for her own legal rights in no manner curtailed her concern for her husband! Nor did the prosecutor argue to the jury that Mrs. Pappalardi's statement that she desired to call her attorney in any way showed a lack of concern for her husband. Thus, the prosecutor's remarks were an improper response to the defense summation. Mrs.

Pappalardi's request for an attorney merely showed that she also had a concern about whether or not she would be arrested. Indeed, such concern might merely have been a concern whether she would be arrested for possession of an illegal weapon. For whatever reasons, however, the People never charged her with this latter crime.

Also, the prosecutor's comment that "According to her testimony, the first thing she thinks of was to call her lawyer" was not a factual statement.

Prior to telling 911 that she had to call her lawyer, Mrs. Pappalardi not only called 911, which is the number to call to obtain help in an emergency, but also told 911 that "A man is

Vagstad's request for an attorney merely showed that she did not want to discuss about whether or not she would be arrested. Indeed, such concern might merely have been a concern whether she would be arrested for possession of an illegal weapon. For whatever reason, however, the People never charged her with this latter crime.

Also, the prosecutor's comment that "According to her testimony, the first thing she thinks of was to call her lawyer" was not a factual statement.

Prior to calling 911, she had to call her lawyer. Mrs. Vagstad not only called 911, which is the number to call to obtain help in an emergency, but also told 911 that "A man is

dying", to "Please hurry" and gave the address of the building and apartment number so that the authorities would know where the emergency was located.

The State has expressed below the possibility that the jury arrived at a compromise verdict or was expressing leniency.

Indeed, at the sentencing of the petitioner, the prosecutor argued, and the Court adopted the State's position, that the defendant was given "every bit of leniency, every bit of sympathy, every bit of mercy, however, misguided, to Mrs. Pappalardi."

The possibility that there was a compromise verdict or that the jury was merely showing mercy heightens the importance of the prosecutor's comments.

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know where the emergency was located.

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Indeed, at the sentencing of the petitioner, the prosecutor argued, and the Court adopted the State's position, that the defendant was given "every bit of leniency, every bit of sympathy, every bit of mercy, however, slightest," to Mrs. Papadimitri.

The possibility that there was a compromise verdict or that the jury was merely showing mercy heightens the importance of the prosecutor's comments.

Clearly, such comments were made to convince the jury that Mrs. Pappalardi intentionally murdered her husband; jurors affected by these comments may have held out for a conviction on one of the counts, whereas others may have urged outright acquittal.

CONCLUSION

WHEREFORE, the U.S. Supreme Court should grant a Writ of Certiorari to review the conviction of the petitioner.

Respectfully submitted
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APPENDIX

ORDER OF THE COURT OF APPEALS, STATE OF
NEW YORK, Dated September 10, 1984

**STATE OF NEW YORK
COURT OF APPEALS**

BEFORE: HON. JUDITH S. KAYE
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

-against-

**CERTIFICATE
DENYING
LEAVE**

GAIL PAPPALARDI,
Defendant.

I, JUDITH S. KAYE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein * there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, NY September 10, 1984

Judith S. Kaye
Associate Judge

*Description of order: Order of the Appellate Division, First Department, of June 28, 1984, affirming the judgment of the Supreme Court, New York County, rendered October 12, 1983.

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES

REPORT OF THE
COMMISSION ON AERONAUTICS

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**ORDER OF THE APPELLATE DIVISION, FIRST
DEPARTMENT, NEW YORK SUPREME COURT,
Dated June 28, 1984**

At a term of the Appellate Division of
the Supreme Court held in and for the
First Judicial Department in the County
of New York on June 28, 1984,

Present: Hon. Theodore R. Kupferman,
Justice Presiding
Sidney H. Asch
Arnold L. Fein
E. Leo Milonas,
Justices

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

-against-

GAIL PAPPALARDI,

Defendant-Appellant.

Order of Affirmance on Appeal from
Judgment 20422.

An appeal having been taken to this
Court by the defendant-appellant from
the judgment of the Supreme Court. New
York County (James Leff, J.), rendered
on October 12, 1983, convicting
defendant of criminally negligent
homicide, and said appeal having been
argued by Hal Meyerson of counsel for
the appellant, and by Bruce Allen of

- 3A -

counsel for the respondent; and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter:

(Illegible) LUGGEI
Clerk

Counsel for appellant is referred to section 606.5, Rules of the Appellate Division, First Department.

JAN 19 1985

ALEXANDER L. STEVENS
CLERK

In the

Supreme Court of the United States

October Term, 1984

GAIL PAPPALARDI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**BRIEF IN OPPOSITION TO THE PETITION
FOR A WRIT OF CERTIORARI**

ROBERT M. MORGENTHAU

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Attorney for Respondent
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NORMAN BARCLAY

BRUCE ALLEN

ASSISTANT DISTRICT ATTORNEYS
Of Counsel

COUNTER-QUESTION PRESENTED

1. Is the propriety of a summation comment which is well-grounded in the evidence an "important" question under Rule 17.1(c) of this Court?



TABLE OF AUTHORITIES

PAGE

CASES:

<u>Doyle v. Ohio</u> , 426 U.S. 610 (1976).....	9
<u>People v. Pappalardi</u> , 102 A.D.2d 1016 (1st Dept. 1984).....	2
<u>People v. Pappalardi</u> , 63 N.Y.2d 777 (1984)....	2
<u>United States v. Suarez</u> , 588 F.2d 352 (2d Cir. 1978).....	8

STATUTE:

New York Penal Law §125.10.....	1
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TABLE OF CONTENTS

	<u>PAGE</u>
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE.....	2
The Crime.....	2
The 911 Calls.....	3
The Trial.....	4
The State Appeal.....	5
REASONS FOR DENYING THE WRIT.....	6
CONCLUSION.....	10



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

No. 84-721

GAIL PAPPALARDI,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to
the Appellate Division, First Department
of the Supreme Court of the State of New York

PRELIMINARY STATEMENT

On October 12, 1983, petitioner Gail Pappalardi was convicted in the Supreme Court, New York County (James J. Leff, J.), after a jury trial, of Criminally Negligent Homicide (New York Penal Law §125.10). Petitioner was



sentenced to a term of one and one-third to four years imprisonment, which she is now serving. By an order dated June 28, 1984, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment of conviction. People v. Pappalardi, 102 A.D.2d 1016. On September 10, 1984, leave to appeal to the New York Court of Appeals was denied. People v. Pappalardi, 63 N.Y.2d 777.

Petitioner now seeks a writ of certiorari to review the order of the Appellate Division, First Department.

STATEMENT OF THE CASE

The Crime

During the early morning hours of April 17, 1983, Felix Pappalardi, a well-known figure in the world of rock music, was shot to death in the bedroom of his Manhattan

apartment. A single bullet entered his neck and pierced his carotid artery. When the police arrived, Pappalardi's wife, petitioner Gail Pappalardi, told them that she had fired the shot. Petitioner also directed the police to the murder weapon, a Derringer, which was on a table in an adjacent room. Approximately one week later, petitioner was indicted for Murder in the Second Degree under a theory of intentional murder.

The 911 Calls

Following the shooting, petitioner called the police emergency number, 911. During the course of that call petitioner told the 911 operator that the shooting had been accidental. Petitioner also stated at one point: "I must call my lawyer". In a return call placed by the 911 operator a few minutes



later, petitioner reiterated that she had not intended to shoot her husband.

The Trial

There was no dispute at trial that the fatal shot had been fired from the Derringer. The principal evidence supporting the intentional murder charge was petitioner's admission to the police that she had shot her husband. The tape recordings of the 911 calls also were admitted into evidence. In her summation, the prosecutor argued among other things that the timing of petitioner's statement to the 911 operator about her lawyer evinced petitioner's consciousness of guilt.

Petitioner took the stand in her own defense, admitting that she had been holding the Derringer just before it went off, but denying that she had ever aimed the gun at

Pappalardi. She offered no explanation of how the gun discharged other than to suggest that she might have been distracted by something. Over defense counsel's objection, the trial judge submitted a number of lesser included offenses to the jury, including Criminally Negligent Homicide.

The State Appeal

In her briefs filed in the Appellate Division, First Department, petitioner contended in part that the prosecutor's comment in summation concerning the "I must call my lawyer" statement violated her Sixth Amendment right to counsel. As noted, the court affirmed petitioner's judgment of conviction without opinion.



REASONS FOR DENYING THE WRIT

1. Petitioner renews the claim that her Sixth Amendment right to counsel was violated when the prosecutor referred in summation to petitioner's "I must call my lawyer" statement to the 911 operator. The disputed passage in the summation reads as follows:

"According to her [petitioner's] testimony, the first thing she thinks of, in the course of speaking to 911, after telling them what the problem is, -- I have to call my lawyer. Why? She knew what she had done, and she knew that she needed to get in touch with somebody who could give her legal advice"*.

Petitioner's assertions notwithstanding, this claim is hardly an "important question" in need of resolution by this Court. See U.S. Sup. Ct. Rule 17.1(c), 28 U.S.C.A.

*Defense counsel's subsequent objection to this comment was overruled.



Respondent has never denied that a comment on a defendant's exercise of his Sixth Amendment rights might be improper; rather, respondent argued in state court that the above comment did not focus on petitioner's Sixth Amendment rights. The issue presented here, therefore, is merely the factual interpretation of this particular comment. Of course, such a factual interpretation is not an issue which this Court need address.

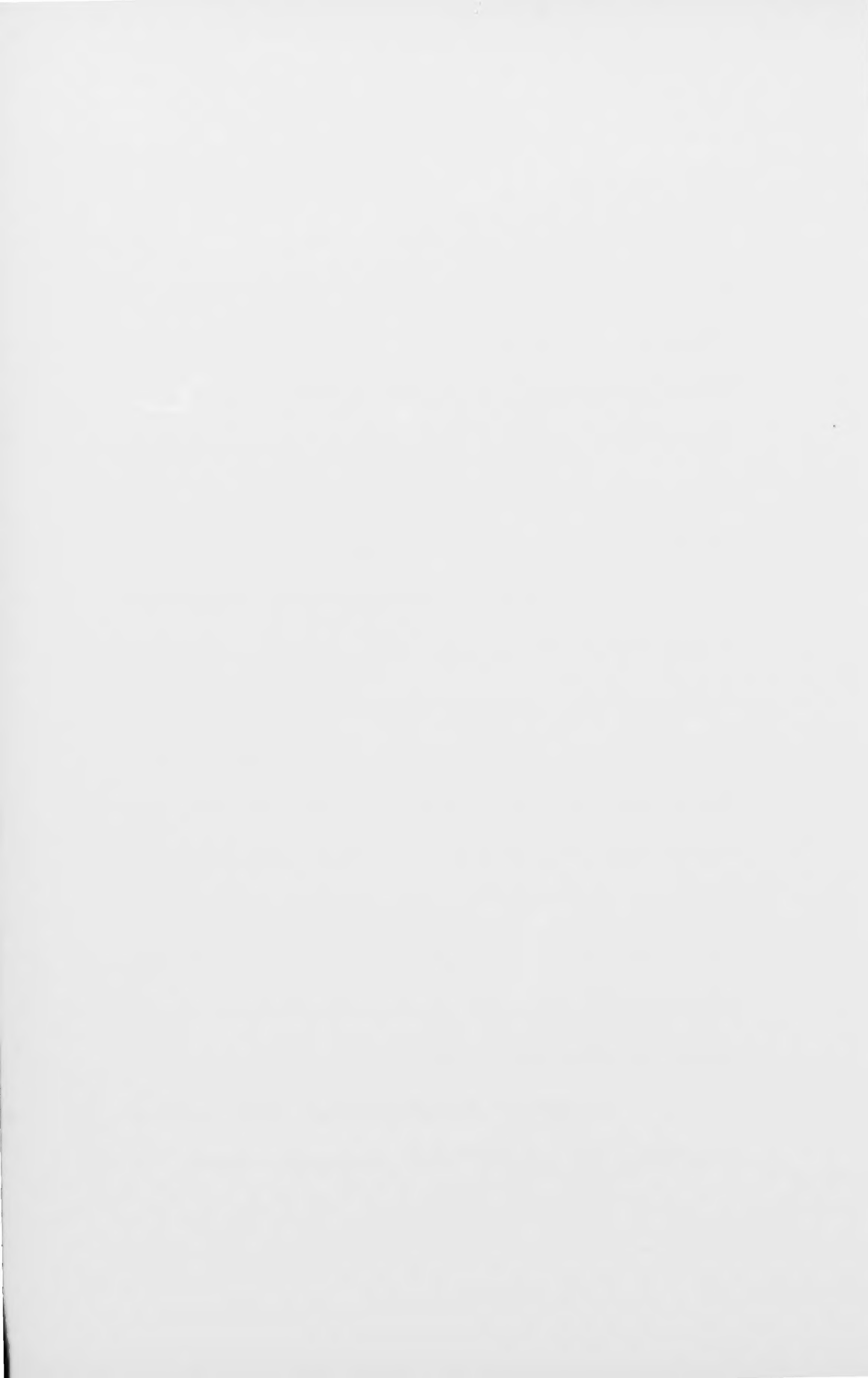
2. Review is not called for in any event because the state courts reached the correct result. As respondent argued below, the prosecutor's comment merely discussed evidence in the record and did not violate petitioner's rights.

Beyond any question, a prosecutor is entitled to draw fair inferences from the evidence adduced at trial. See, e.g., United States v. Suarez, 588 F.2d 352 (2d Cir. 1978). At the time petitioner made the "I must call my lawyer" statement, the police had not yet arrived and petitioner did not even know whether her husband would survive. Yet her concern for him was not all-consuming; she also was sufficiently worried about her own predicament to want to consult an attorney. Under these circumstances, the prosecutor was free to argue that the jury should consider the timing of this statement, along with all of the other evidence, in evaluating petitioner's criminal intent.

Nor is there any merit to petitioner's theory that she was exercising her rights when she mentioned the lawyer. Although

petitioner likens the comment in question to comments on a defendant's right to remain silent following his arrest, there is a crucial difference. Once a defendant is arrested, his Miranda rights attach automatically. His subsequent silence can not be penalized, therefore, because it is insolubly ambiguous: he may be doing no more than exercising one of those rights. See Doyle v. Ohio, 426 U.S. 610, 617 (1976). Here, on the other hand, petitioner was not under arrest — and her rights had not attached — when she spoke to the 911 operator. As a result, anything petitioner said to the operator, or perhaps neglected to say, was fair game so long as it tended to show her guilt.

In short, the prosecutor said nothing untoward in making an argument based on



- 10 -

evidence in the record. No issue in this case is worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County

NORMAN BARCLAY
BRUCE ALLEN
Assistant District Attorneys

Of Counsel

January 17, 1985